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IN THE

Supreme Court of the United States

October Term, 1968

No. 62

THOMAS R. KAISER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

NOTICE OF MOTION AND RESPONDENT'S SUPPLEMENTARY BRIEF

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Notice of Motion

Respondent hereby respectfully moves for leave to file the supplementary brief which accompanies this application. This cause was argued on January 16, 1969. In this supplementary brief, Respondent respectfully brings to the Court's attention certain developments of which counsel has become aware since the briefing and oral argument of this case. Since these developments relate to Respondent's argument in this case, as developed in its briefs and at the oral argument, a portion of Respondent's argument is summarized in the discussion in connection with the treatment of these developments.

It is respectfully submitted that the discussion in this supplementary brief will provide substantial assistance to the Court in its difficult task of judgment in a case critically important in its implications for the future of law enforcement in a free society.

Notice of Motion

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RESPONDENT'S SUPPLEMENTARY BRIEF

Introduction

This cause was argued before the Court on January 16th of this year. In this supplementary brief, Respondent respectfully brings to the Court's attention certain developments of which counsel has become aware since the briefing and oral argument of this case.

Since these developments relate to Respondent's argument in this case, as developed in its Briefs and at the oral argument, a portion of Respondent's argument is summarized in the ensuing discussion in connection with the treatment of these developments.

ARGUMENT

A. If this Court should declare official wiretapping to be within the regulation of the Fourth Amendment, whether on the basis of a broadly-conceived formulation of the *Katz* personal privacy doctrine, or by an extension of traditional search and seizure analysis, the process of law enforcement would be seriously compromised.

Respondent has argued that this Court should not declare official wiretapping to be within the control of the Fourth Amendment, and that, even if it does, the *Berger* and *Katz* rules should not be enforced in this case since the wiretapping here in question and the trial in this case occurred before these decisions were announced.

Respondent urged that the language of the Fourth Amendment, and especially the narrowly confining phraseology of its Warrant clause, seems not to include eavesdrops of conversation within the scope of its regulation and to confirm the validity of the "contact" theory commended to the Court by Respondent as the proper determinant of Fourth Amendment protection. On both a semantical and historical analysis of the Fourth Amendment, it is clear that it was not designed to protect the *kind of interest* which is sought to be vindicated by those who seek constitutional protection for telephonic secrecy. Therefore, it can not be argued validly that the "underlying purpose" of the Fourth Amendment justifies the expansion of its coverage to include types of surveillance unknown when the Fourth and Fourteenth Amendments were drafted.

It is true that, in *Katz,* this Court rejected the trespass and physical penetration tests which had been approved in earlier cases, and, in doing so, overruled the *Olmstead* case. However, it may be argued that *Olmstead* was overruled only to the extent that it sanctioned the trespass doctrine and not in its ultimate holding that wiretapping was not within the control of the Fourth Amendment. The

Court might well invoke an alternative rationale, *e.g.*, Respondent's contact theory, to reach the same result as that contrived in *Olmstead.*

It is also true that the Court declared in *Katz* that "the Fourth Amendment protects people and not simply 'areas' " but the full implications of this statement await development in later formulations of this Court. Mr. Justice Harlan, concurring in *Katz,* seemed to argue that the Court in *Katz* had not propounded a radical doctrine of privacy which would protect personal privacy in all contexts unrelated to a place or area. One authority has interpreted Justice Harlan's understanding of the Court's decision in *Katz* as indicating that the Court extended Fourth Amendment protection in *Katz* because the electronic surveillance of the telephone booth there involved was equivalent in effect to a physically intruding ear. (See the recently published article by Prof. Edmund Kitch, "*Katz* v. *U.S.*", The Supreme Court Review, 1968, page 137-8.) The same commentator has suggested that *Katz* may be interpreted in this narrow way but that it may also be construed broadly to include within the scope of the Fourth Amendment *any* official intrusion on privacy by any investigatory device (Kitch, *supra,* p. 138).

It is true that *Katz* seemed to reject the simplistic statement of the "protected area" concept propounded in such cases as *Lanza* v. *New York* (370 U.S. 139, 1962). But it can be argued that what the language in *Katz* was condemning was an abstract, a priori characterization of given types of places or areas as private (*e.g.*, a home, private office) without attention to the particular facts of the situation in question to determine whether *in those circumstances* the conversant could justifiably expect privacy. In this view *Katz* merely stands as a bar to a mechanical application of an abstract, protected area test; it simply adds a refining criterion to that test and does not abrogate the long accepted view that Fourth Amendment protection of personal privacy is tied to a protected area or place.

In Respondent's view, the Court should *follow this conservative approach and should not jettison the protected area principle completely because it will then be cast on a sea of uncertainty with no clear standards to guide the adjudications of lower courts or the actions of police officers.* If wiretapping is declared to be regulated by the Fourth Amendment and if *Katz* were to be applied to this case retroactively in a decision pronouncing a thoroughgoing doctrine of personal privacy divorced from all association with the protected area concept, this would render constitutionally suspect all types of privacy-invading police investigative devices indulged in without a warrant and make the chief business and burden of lower courts the endless issuance of warrants.

It is respectfully urged that, although the Court has dispensed with the need of trespass or physical intrusion as a condition of Fourth Amendment protection, it should still require some physical *contact* (if not a trespass or physical intrusion) to activate that Amendment. Such a requirement would be a natural progression in an evolving thread of doctrine which previously advanced from the onerous *Olmstead* trespass restriction to the less burdensome physical intrusion principle articulated in *Silverman.* The progression from the *Silverman* physical intrusion test to the minimum contact theory thus does no violence to the normal processes of doctrinal development. Moreover, since *there was physical contact in Katz,* it is not clear that *Katz* really holds any more than this.

To the extent that the Court views Katz as going beyond the doctrinal limits here commended, it is respectfully prayed that the case should be reconsidered. Constitutional adjudication must respond to the imperatives of practical necessity. If the *Katz* doctrine is not so confined, it may be argued that non-electronic overhearing of conversations between criminals talking confidentially in a street or park or at a secluded table in a public restaurant

or airline terminal will be within the control of the Fourth Amendment and may proceed only with the permission of a warrant.

Indeed, a *Katz* doctrine shorn of a physical contact limitation would imply that invasion of privacy by visual surveillance, with or without aid of a telescope, flashlight or binoculars, may only proceed under authority of a warrant. Thus looking through a keyhole, or peering into a room through the unsuspected opening in window blinds, or eavesdropping without electronic aid outside of a door to a room or outside of a window of a house, which room or house may reasonably be presumed by the conversants to be isolated and in a secret location, would become a major operation requiring judicial validation after burdensame presentation of proof (and usually such proof would not exist).

This result would follow even under Mr. Justice Harlan's interpretation of *Katz*, which may be read as suggesting that although place is a predicate of protection, the constitutional guarantee will be activated where the place or protected area is penetrated by any auditory or visual means, even where these do not involve physical contact with the place in question.

An unlimited *Katz* doctrine may even prohibit official encroachment on privacy in public places unless a warrant is obtained. It has been suggested that what occurs in public is not protected. But it can be argued that the *Katz* test of *justifiable reliance on privacy* may throw the mantle of protection around situations where, for example, a narcotics distributor with a reasonable expectation of privacy is passing narcotics to a pusher in a dark and apparently deserted corner of a park that is suddenly lit up by a police flood light or where criminal activity is occurring in an isolated field, apparently free of spying eyes or ears, but actually surveilled by a policeman one mile away looking through a telescope or employing electronic eavesdropping equipment.

Under a radical personal privacy doctrine, almost all official investigative devices would require the sanction of a warrant. Such a regime would overburden the courts to the point where they would have time for little else. Also, it would deal a paralyzing blow to law enforcement, since shadowing and covert visual observation are used to obtain evidence amounting to probable cause so as to enable the procurement of search warrants. Ordinarily, these preliminary investigative techniques can not also be justified by a showing of probable cause, since, in the early stages in which they are employed, there is usually little evidence available. Obviously, at the beginning of an investigation, proof amounting to probable cause does not exist, and if it is insisted that no investigation may begin until such a quantum of evidence has been obtained, it will not be possible to conduct any investigation at all, especially in organized crime cases where it is difficult to get eye witness testimony and where secret informer tips must be corroborated by privacy-invading investigative techniques.

Unless this Court confines the scope of the *Katz* rule, its doctrinal implications may, especially if seemingly affirmed by a broadly conceived later formulation, induce lower courts throughout the country to rule inadmissible all evidence obtained by any privacy invading technique unauthorized by a warrant. At the least, it would impose upon the courts a staggering burden of evidence-suppression hearings at a time when they are already overloaded to the point of collapse.

Under a "contact" theory, most official wiretapping would not be within the scope of the Fourth Amendment, since such wiretapping usually occurs at some distance from the place in which the overheard telephone is located. That was true in this case. Here the wiretapping equipment was in the basement of the hotel. The hotel allotted space on its first floor to the Headline Bar in which

the overheard telephone was located. Thus the wiretap equipment had no contact with the Headline Bar premises. Actually, the Headline Bar used a different portion of the basement which was segregated by a wall partition from the remainder of the basement wherein the wiretap equipment was located, although this does not appear in the record. And even if the entire basement were part of the bar premises, which it was not, the placing of the wiretap equipment in the basement would amount to a consent search, if the Fourth Amendment were applicable, because a hotel representative permitted the detectives to place the equipment there (Appendix, 140).

Moreover, the overheard telephone had two extensions and was in a public bar so Conte, talking from the bar, could not justifiably rely upon a situation of privacy nor could *Kaiser*, talking from a public place of employment, since he must have known the telephone set up at the Headline Bar, having worked there on weekends as a bartender. That he knew the telephone was in a public place is indicated by the form of address of the person answering the phone at the Headline Bar when *Kaiser* called there (*e.g.* "Headline Lounge"; see page 269, Appendix).

This Court indicated as late as the *Lanza* decision that where the area eavesdropped was one which could have been searched for physical objects without a warrant then an eavesdrop might proceed without a warrant. A similar approach is noted in the recent commentary concerning the *Katz* case (see Prof. Edmund Kitch, "*Katz* v. *U.S.*", Supreme Court Review, 1968, page 137). A public bar is subject to search by public officers under Fourth Amendment doctrine and under the state law and liquor authority regulations.

It is respectfully urged that this Court should not read the Fourth Amendment as it has been urged to do by proponents of a broad interpretation of *Katz*. If it leaves the

safe shelter of traditional Fourth Amendment principles, judicial discretion will *wander at large, bereft of those guiding techniques of interpretation which give the certainty and predictability* on which law enforcement must rely if it is to achieve an effective performance.

If the Court should place its stamp of approval on an extreme personal privacy reading of the Fourth Amendment, then it will take years for it to fashion limiting principles, and even those it formulates are unlikely to instruct the police functionary to a clear forevision of what particular situations are private in contemplation of law and beyond his investigatory power. This conclusion proceeds from the insight that once the relatively definite "protected area" and "physical contact" concepts are discarded, the only technique of discrimination will involve the subjective process of interest balancing or the difficult task of discovering and judicially sustaining popular notions of privacy with all of their fluctuations and obscurities. Such a judicial regime will constitute a continuing exercise in subjectivism.

The interest-balancing technique yields ad hoc, particularized judgments rather than clear general rules. The proposed "contact" theory would afford police officers a simple workable test of when they must procure a warrant. Unless the *Katz* doctrine is so limited, it will either be applied so as to require a warrant with respect to every investigatory act—an impossibly burdensome regime of practice—or, if the rigor of such a principle is sought to be tempered by a judicially-derived limiting principle, it will institutionalize a condition of continuing confusion in that field of endeavor whch is crucial to the maintenance of those conditions of public order which are the minimum requirements of civilized society. It seems inconceivable that an enlightened community should interpret its Constitution—the document ordaining the organic principles of its survival—as demanding such a continuing threat to the foundations of social organization.

In its main Brief in this case, Respondent predicted that the "personal privacy" language of the *Katz* decision might induce lower courts to adopt an extreme privacy doctrine requiring that all types of privacy-invading official investigatory activities be authorized by warrant. This prophecy seems to have been borne out by developments occurring since the *Katz* case.

For example, in a recent decision in New York, *People* v. *Jennings and Stas*, a New York court, the Appellate Term for the Ninth and Tenth Judicial Districts, Second Department, has expressed such an extreme reading of *Katz*. The text of that court decision is as follows:

> "Judgments of conviction unanimously reversed on the law and facts and complaints dismissed.
>
> The police officer's observation of what appeared to be a small flickering light through the drawn drapes of a motel room, without any accompanying circumstances other than voices and laughter emanating therefrom, furnished no reasonable grounds for believing that a crime was being committed in the said room or that the occupants therein were in any imminent danger. Consequently, the act of the officer in stooping down to look into the room through a three-inch space between the windowsill and the bottom of the drapes constituted an unlawful invasion of defendants' right of privacy (*Katz* v. *United States*, 389 U.S. 347; *State of Texas* v. *Gonzales*, 388 F 2d 145; see *People* v. *Gallmon*, 19 N Y 2d 389, cert. den. 390 U.S. 911; *People* v. *Terrell*, 53 Misc 2d 32). Under the circumstances, the motion to suppress the evidence obtained by this means should have been granted. Since it does not appear that the People have any other evidence, the complaints should be dismissed."

It should be pointed out that even if the Court should avoid enunciating a full-blown privacy doctrine and instead should bring wiretapping within the goverance of the Fourth Amendment by an extension of traditional search

and seizure doctrine, the consequences may be almost as disastrous for law enforcement as if a broad reading of *Katz* were the basis of decision. That this is so may be inferred from the fact that wiretapping (and the wiretapping in this case) is conducted without physical contact with the place in which the conversing party is located. If such an evidence-gathering technique is within the scope of the Fourth Amendment, it would follow by implication that other types of investigatory activity not involving physical contact are also subject to the warrant requirements of that Amendment.

B. Respondent's abatement argument and its prayer that the court modify the *Fuller* v. *Alaska* doctrine should be considered by this court, since respondent may not be able to assert these legal grounds effectively through any other avenue of recourse.

In the course of his oral argument for Respondent, the District Attorney of Nassau County asked the Court to modify the rule of *Fuller* v. *Alaska* so as to provide that the *Lee* v. *Florida* doctrine would apply only in cases where both the wiretapping and the introduction of the wiretap evidence occurred after the date of the *Lee* decision. The District Attorney stated that there were many important cases in his office awaiting trial in which wiretap evidence was a vital element of the People's proof and that these cases could not be prosecuted successfully unless the *Fuller* v. *Alaska* rule was modified in the way he requested.

Mr. Justice Brennan objected to Respondent's request in this regard on the ground that, in *Kaiser*, both the wiretapping and the use of wiretap evidence at the trial occurred before the *Lee* decision was announced, that the *Fuller* doctrine was thus sufficient to protect Respondent's interest in *Kaiser* and, therefore, an adjudication going beyond *Fuller*, being unnecessary for the disposition

of the *Kaiser* appeal, would place a needless burden of judgment upon the Court.

Mr. Justice Brennan observed that there was another avenue of relief available: the District Attorney could seek a modification of the *Fuller* doctrine in these aforesaid pending cases by asserting a prayer for such modification in appeals from decisions in pre-trial hearings in those cases barring wiretaps from evidence on the authority of *Lee* and *Fuller*.

It is true that Section 518 of the Code of Criminal Procedure permits The People to appeal from an adverse ruling in a pre-trial search and seizure suppression hearing of the type provided for in Section 813-c of the Code of Criminal Procedure. It is also true that a decision of the New York Court of Appeals seemingly proceeds upon the assumption that a wiretap hearing is subject to the provisions of 813-c and that The People may appeal from an Order of Suppression in such a wiretap pre-trial proceeding. (See *People* v. *Cohen*, 42 Misc. 2d, 403-405; 24 A.D. 2d 900, 2d Dept. 1965, affirmed without opinion in 18 N.Y. 2d 605). However, in the *Cohen* case, the defendant apparently did not assert the claim that the statutory right of appeal established in Section 518 was not broad enough to authorize appeals from pre-trial wiretap hearings.

Moreover, it might be argued that the doctrinal import of *Cohen* is uncertain. It is true that the Court of Appeals affirmed an order of the Appellate Division which, at the instance of a prosecutor appellant, had modified a trial court order vacating the wiretap order in question as based upon an inadequate affidavit. However, defendant's motion to suppress sought the suppression of evidence obtained by a physical search and seizure as well as that obtained by wiretapping. Thus it can be argued that *Cohen* does not authorize an appeal by the prosecution where the suppression involves wiretap evidence alone. That this conclusion is not without a certain plausibility is indicated

by the further fact that the branch of the motion seeking suppression of wiretaps was based in part on the theory that seized evidence was the fruit of illegal wiretapping and that it was necessary to pass upon the legal status of the wiretap evidence as a necessary prelude to determining whether the seized material was admissible in evidence (See *People* v. *Cohen*, 42 Misc. 2d 403, at page 409).

It is not suggested that Respondent accepts the foregoing analysis. Indeed, the trial court in *Cohen* seems to have proceeded upon the explicit premise that Section 813-c, the provision of New York law authorizing suppression hearings, applies equally to seized evidence and wiretap evidence (See 42 Misc. 2d, at page 405). However, since the Court of Appeals did not write an opinion in the case, it is not certain what rationale forms the basis of its assumption that the prosecutor could appeal the trial court's order suppressing wiretap evidence and seized evidence.

In addition, the Court of Appeals, in a decision announced after the trial court's order in *Cohen* but before the Court of Appeals' decision in Cohen, declared that the search and seizure suppression hearing authorized in Section 813-c could not be equated with the pre-trial wiretap hearing (*People* v. *McCall*, 17 N.Y. 2d 152, 156, 157).

Also, in *People* v. *Habel* (18 N.Y. 2d 148), decided by the Court of Appeals on July 7, 1966, *the same day on which it decided People* v. *Cohen*, the Court had under review that portion of the aforesaid Section 813-c which provides that an appeal may be taken by a defendant, notwithstanding a plea of guilty, where a motion for the return or suppression of property, papers or things unlawfully obtained is denied. The Court of Appeals held that recordings of conversations made pursuant to judicial orders authorizing eavesdropping under Section 813-a of the Code of Criminal Procedure are not "property" unlawfully obtained" within the meaning of Section 813-c and that defendants' appeals were properly dismissed.

(See also *People* v. *Laverne*, 14 N.Y. 2d 304, holding that oral statements heard during an illegal search were not within the ambit of Section 813-c).

Finally, it may be observed that Section 518, providing the circumstances in which an appeal by the prosecution is permitted, is located in Part IV of the Code of Criminal Procedure, which part is entitled "Proceedings in Criminal Actions Prosecuted by Indictment". Some of the pending cases in which office involving wiretaps were prosecuted *by information rather than indictment.*

In *People* v. *Dimmie* (42 Misc. 2d 521, aff'd without opinion in 15 N.Y. 2d 578) the County Court of Westchester County, New York, held that the right to appeal from a judgment of conviction rendered in a Court of Special Sessions is a privilege granted by Section 751 of the Code of Criminal Procedure and that the procedures set out in that section must be followed rather than the procedures set out in Section 521 of the Code, since the latter section, dealing with prosecutions by indictment, is inapplicable to appeals from Courts of Special Sessions.

Some of the pending cases involving wiretap evidence in Nassau County District Attorney's Office are pending in the District Court of Nassau County, a Court of Special Sessions. (See Section 230, Nassau County District Court Act.)

The County Court, in *Dimmie,* held that Section 751 provides for the taking of an appeal within 30 days after judgment by filing an affidavit with the Clerk of the Court and since defendant had not complied with this provision he had lost the right to appeal. The Court rejected the defendant's argument that his time to appeal had not expired because the provisions of Section 521 of the Code grant a defendant 30 days to appeal from the time a copy of the judgment of conviction with notice of entry is served upon him. The Court held in part:

"The appeal in this case could only be taken pursuant to section 751. It could not be taken pursuant to section 521. Defendant had no choice. The reason is apparent upon consideration of the main division of the code. Part IV, in which section 521 is included, pertains to "Proceedings in Criminal Actions Prosecuted by Indictment", while Part V, in which section 751 is included, pertains to "Proceedings in Courts of Special Sessions and Police Courts." These "Parts", insofar as they deal with appeals, are complete in themselves, and the provisions of one part do not apply to provisions of the other part unless expressly adopted. Part V contains no provision directly or by inference which can be construed as incorporating section 521 in the procedure relating to appeals from Special Sessions (*cf. People* v. *Cornell, supra*, p. 828).

In *People* v. *Omans* (306 N. Y. 375, *supra*) the defendant, in appealing from a judgment of conviction rendered in a Court of Special Sessions, served a notice of appeal on the Justice of the Peace, within the 30-day period after judgment. Prior to argument of the appeal in the County Court, the District Attorney moved to dismiss the appeal because of defendant's failure to serve an affidavit of errors as required by section 751: Counsel for defendant sought leave to cure the defect pursuant to section 524-a of the code, which pertains to correction of errors in perfecting an appeal. In affirming the dismissal of the appeal, Judge Froessel held for the Court of Appeals that the County Court did not have power under section 524-a to relieve defendant from his failure to comply with section 751. As was said of section 521 in *People* v. *Cornell* (*supra*) Judge Froessel wrote (p. 378) that "There is no provision in Part IV or V which may in anywise be construed as making section 524-a referable to the procedure prescribed in section 751".

Counsel for the defendant also argues that section 520-a of the code expressly provides that the provisions pertaining to appeals in sections 517 through 520 of the code shall supersede all other provisions of the code dealing with appeals in crimi-

nal actions, and by implication supersede the appeal procedure provisions of section 751. The argument is without substance, since section 520-a is expressly limited in its application to superseding only those other code appellate provisions which are in conflict with sections 517 to 520. Clearly, none of these sections is in conflict with section 751.

The only mention of appeals from Courts of Special Sessions to be found in the foregoing sections of the code mentioned in section 520-a is in section 517 (subd. 3, cl. [b]), which states that an appeal may be taken by the defendant as of right from a judgment of conviction in a criminal action: "(b) to the county court of the county in which the conviction was had, from a conviction by a court of special sessions, police court, police magistrate or justice of the peace". Section 520-a was added to Part IV of the code by chapter 806 of the Laws of 1954. No change was made, however, in section 751, which has not been amended since 1941. In the absence of any specific pronouncement by our appellate courts, this court will follow the decision in *People* v. *Omans* (*supra*) and hold that section 751 of the code alone governs appeal procedure on appeals from Courts of Special Sessions to this court (*People* v. *Palmer, supra; People* v. *Van Slyke,* 31 Misc 2d 434 [1961]) and that section 521 is not applicable and does not govern such appeals."

It is uncertain to what extent the New York Court of Appeals presently subscribes to the rationale of the County Court's holding in *Dimmie,* since the Court of Appeals affirmed in *Dimmie* without an opinion. The County Court's approach in *Dimmie* is understandable, since Section 751 of the Code prescribed a special procedure to be followed in initiating appeals from judgments of Special Sessions Courts. Whether the Court of Appeals would hold Section 518 of the Code, providing for appeals by the prosecutor from decisions on suppression hearings, inapplicable to appeals from judgments of Special Sessions

Courts seems questionable. Admittedly, however, the issue is not free from all doubt and thus it could not be stated unequivocally that the law of New York clearly permits an appeal by The People from orders suppressing evidence in the District Court of Nassau County or in other Special Sessions Courts throughout the State.

Moreover, although the matter is not free from doubt, it may not be possible for The People to persuade the trial courts to convene pre-trial wiretap hearings analogous to search and seizure suppression hearings in cases where the defendant is merely asserting legal issues and raises no questions of fact which a hearing is required to resolve (See *People* v. *Alfinito*, 16 N.Y. 2d 81). In such situations, some trial judges may postpone until the trial a decision on the legal issues concerning the admissibility of wiretap evidence.

Under the law of New York, the People's right of appeal exists only to the extent that it is authorized by statute (See: Sec. 518, Code of Criminal Procedure; *People* v. *Fay*, 268 Ap.Div. 135). The New York statutory scheme does not permit an appeal by The People from an order or judgment rendered at a trial (See Section 518, CCP). Thus the People will be unable to appeal a ruling of inadmissibility, if it is made at the trial rather than at a pre-trial hearing.

Therefore, there exists the distinct possibility that the People will be denied the appellate recourse which would enable them to obtain modification of the *Fuller* v. *Alaska* doctrine so as to protect the public interest by avoiding the dismissal of important pending prosecutions and preventing criminals from invoking the *Lee* v. *Florida* rule so as to escape punishment and rehabilitation.

Furthermore, if The People are not able to obtain a pre-trial wiretap hearing in some cases or to appeal a decision in a pre-trial wiretap hearing, the People will be unable

to obtain appellate review of another contention which it has raised in this Court in this case—its claim that the recent enactment by Congress of the Omnibus Crime Control and Safe Streets Acts of 1968 abated and rendered inoperative the provisions of Section 605 (See p. 79 of Respondent's main Brief). Mr. Justice Brennan, in the aforesaid comments reflecting a reluctance to entertain The People's prayer for a modification of the doctrine of *Fuller* v. *Alaska*, indicated that the Court may be similarly disinclined to deal with The People's abatement argument.

This argument will be pertinent in all cases where wiretap evidence was obtained during the period prior to June 19, 1968, when Section 605 was in force. Various cases pending in the Nassau County District Attorney's Office are based upon the evidence obtained from such wiretaps and it is thus important that The People contrive some means of advancing the abatement claim effectively.

The People's contention in this regard is simply that Section 605 is not available to the defendant as the basis for an objection to the introduction of wiretap evidence since Section 605 is no longer in force, having been repealed on June 19, 1968, two days after the *Lee* decision, by the enactment in Congress of the aforesaid Safe Streets Act. Therefore, under the doctrine propounded by this Court in *Hamm* v. *Rock Hill* (379, 306), it follows that 605 abated and can not be validly invoked as a ground for relief.

The United States Department of Justice and the F.B.I. have taken the official position that 605 was not violated by wiretapping alone and that both a wiretap interception *and divulgence* were necessary to bring the statute into operation. They defined "divulgence" as publication outside of the governmental realm thus viewing as exempt from the bar of the statute all divulgence among cooperating law enforcement officers. (See Brownell, The Public Security and Wiretapping, 39 Cornell L.Q. 195, 197-199, 1954; Rogers, The Case for Wiretapping, 63 Yale L.J.

792-3, 1954 Katzenbach 32 FRD 107; Hoover, 58 Yale L.J. 422-1949).

Respondent also asserts this argument in connection with its abatement contention since, if divulgence was necessary to the violation of Section 605, such divulgence can hardly be considered as legally objectionable after 605 has been repealed. It is true that some observers have viewed the Court's decision in the second *Nardone* case (*Nardone* v. *U.S.*, 308 U.S. 338) as indicating that interception alone is a violation of 605, but, in the later *Benanti* case) the Court placed the issue in doubt by expressly reserving the question. (See *Benanti* v. *U.S.*, 355 U.S. 96, page 100, n. 5.).

The abatement argument was not raised in either *Lee* v. *Florida* or *Fuller* v. *Alaska*. Nor, so far as Respondent is aware, were the contentions there advanced that mere interception does not violate 605 and that a divulgence occurring after 605 has gone out of existence is not ground for reversal of a State judgment of conviction.

Counsel for criminal defendants in Nassau County, and, presumably, in other jurisdictions in the State of New York, invariably make a pro forma objection to the admission of wiretap evidence. Counsel all know about, and are in the habit of citing, the *Lee* and *Fuller* cases as grounds for the exclusion of wiretap evidence. Thus pending cases based upon wiretaps obtained prior to June 19, 1968 (the date of 605's repeal) will probably all be dismissed if the Respondent herein is not able to obtain appellate recourse with respect to the wiretap issue. Jurisdictions in this State other than Nassau County and, indeed, jurisdictions throughout the country, are in a similar situation.

It is respectfully submitted that this Court should not hesitate to modify the *Fuller* v. *Alaska* rule in the manner prayed for by Respondent on the ground that such a decision will constitute dictum, since other retroactivity decisions of this Court contain a dimension of dictum.

There is no reason why this Court should not save from dismissal pending cases based upon wiretap evidence by modifying the *Fuller* v. *Alaska* rule or invoking the abatement doctrine, since it is now the public policy of this country (as expressed in the federal legislation of June 19, 1968) to permit official court ordered wiretapping and since the wiretaps in the aforesaid pending cases in New York were required by 813-a to be approved by Court Order under substantial safeguards analogous to, although not identical with, those mandated in the new federal legislation.

In view of the fact that the protective provisions of the new federal law are now in effect, there is nothing to be gained from a policy which permits pending criminal prosecutions to be defeated by the enforcement of a now repealed Section 605 in a manner in which it was never applied during the 34 year period in which it was in effect.

The foregoing discussion is respectfully presented by Respondent with the intent of aiding the Court in the difficult task of judgment in a case critically important in its implications for the future of law enforcement in a free society.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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